CITIZENS AGAINST GOVERNMENT WASTE

Thomas A. Schatz
President

June 9, 2017

Chairman Ajit Pai
Commissioner Mignon Clyburn
Commissioner Michael O'Rielly
Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

RE: Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment (WT Docket No. 17-79, FCC 17-38)

Dear Chairman Pai, Commissioner Clyburn, and Commissioner O'Rielly:

On behalf of the more than one million members and supporters of Citizens Against Government Waste, I submit the attached public comments to the Federal Communications Commission (FCC) regarding the proposed Notice of Proposal Rulemaking in the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment (WT Docket No. 17-79, FCC 17-38).

If you have any questions or concerns, please contact either myself or Deborah Collier at (202) 467-5300. Thank you for your consideration of our remarks.

Sincerely,

Thomas Schatz

President
Citizens Against Government Waste

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C.

In the Matter of	)	
	)	
Accelerating Wireless Broadband Deployment by	)	WT Docket No. 17-79
Removing Barriers to Infrastructure Investment	)	FCC 17-38
	)	

Comments of
Thomas A. Schatz
President
Citizens Against Government Waste

June 9, 2017

Citizens Against Government Waste (CAGW) is a private, nonprofit, nonpartisan organization dedicated to educating the American public about waste, mismanagement, and inefficiency in government. On behalf of the more than one million members and supporters of CAGW, I offer the following comments in respect to Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment (WT Docket No. 17-79, FCC 17-38) to aid in encouraging more rapid broadband deployment in unserved regions of the country through a streamlined and affordable process.

A key component for removing barriers to infrastructure investment for wireless broadband deployment is increasing the amount of available spectrum for private sector use. As consumers adopt new technologies to harness the power of the internet, through smartphones, wireless devices, and the Internet of Things (IoT), so has the demand for more spectrum in both the licensed and unlicensed space.

As of April 2013, the federal government held exclusive rights to more than 638 MHz of spectrum and shares another 1,030 MHz with commercial users. While Congress has ordered federal agencies to free up unused spectrum to be auctioned by the Federal Communications Commission (FCC), spectrum usage within each agency remains a critical inventory management issue that the federal government must address in order to make educated decisions on the availability of spectrum for auction.

An annual or biannual review of government-held spectrum that is "in the pipeline" should be required of all federal agencies holding spectrum allocations, to determine whether this spectrum is viable for disbursement to the private sector in future spectrum auctions. In addition, a relaxation of the rules governing the secondary market for spectrum may be in order, so that companies with excess, unused spectrum would be able to trade out some of that spectrum to increase access to spectrum where it is needed most. CAGW recommends that the FCC work in conjunction with the National Telecommunications and Information Administration to ensure that government-held spectrum is appropriately inventoried, and available spectrum is made ready for auction as quickly as possible.

Since the first generation of wireless communications was deployed in 1982, a new generation has been standardized and made publicly available approximately every 10 years. The fourth generation, or 4G, has been around since 2012, and has provided new and innovative services to businesses and individuals around the world. Yet the telecommunications industry is not standing still; it is already moving forward with the development of 5G, which could be available for public use by the early 2020s.

The 5G networks will provide enhanced wireless connectivity to address the increasing demand to support broadband over mobile networks and enable greater use of IoT. While the

applications will be widespread, they will particularly helpful for energy, health, public safety, and transportation, according to a January 2017 Deloitte study.[1] For example, smart grid adoption could create $1.8 trillion in additional revenue to the U.S. economy and save consumers hundreds of dollars per year; connected health related devices could create $305 billion in annual health systems savings from decreased costs and mortality due to chronic illnesses; improvements in public safety response times enabled by wireless technology could reduce crime related mortality rates by 8 percent; and, self-driving cars connected through wireless technology could reduce emissions by 40-90 percent, travel times by nearly 40 percent, and delays by 20 percent. The study also estimates that self-driving cars could save 21,700 lives and $447 billion per year.[2]

A February 2017 Accenture report noted that regardless of size, all communities can benefit from integrating Smart City technologies, such as the management of vehicle traffic and electrical grids, maintenance of infrastructure, and greater connectivity for all local residents and businesses.[3] For example, Saratoga, California, with a population of 29,900, would be able to add 300 new jobs, and increase the gross domestic product (GDP) by $50 million, with a 5G network investment of $20 million. A city like Chicago, Illinois, with a population of 9.5 million people, could create 90,000 new jobs and grow its GDP by $148 million, with a 5G network investment of $88 million.[4] However, new 5G networks require access to more spectrum, fewer

[1] "Wireless Connectivity Fuels Industry Growth and Innovation in Energy, Health, Public Safety, and Transportation," Deloitte, January 2017, https://www.ctia.org/docs/default-source/default-document-library/deloitte_20170119.pdf.
[2] Ibid.
[3] "Smart Cities: How 5G Can Help Municipalities Become Vibrant Smart Cities," Accenture Strategy, February 2017, https://newsroom.accenture.com/content/1101/files/Accenture_5G-Municipalities-Become-Smart-Cities.pdf.
[4] Ibid.

restrictions on deployment of cell towers, a lowering of tax burdens on innovators, and improved access to rights of way.

The administration's budget proposal for fiscal year (FY) 2018 contains an infrastructure plan to support $1 trillion in private/public infrastructure investment, including broadband.[5] As this concept is further developed, it should include measures that will reduce regulatory barriers, particularly state and local laws and ordinances, that hinder deployment of broadband by the private sector. This is critical for regions of the country that currently have no broadband service to help bridge the digital divide.

In addition to the administration's plans for infrastructure investments, more needs to be done to clear the path for future spectrum auctions. The Spectrum Pipeline Act of 2015 requires the auction of 30 MHz of spectrum below 6 GHz by 2024, and the administration's budget proposes to extend the FCC's authority to conduct auctions in anticipation of additional spectrum assignments that may be made available.

As the FCC prepares for these auctions, the agency should avoid being placed in the unsavory position of picking winners and losers in an auction by setting restrictions on some of the companies who might plan to bid on spectrum.[6] For example, when former FCC Chairman Wheeler updated the agency's Mobile Spectrum Holding rules in June, 2015, up to 30 megahertz of low-band spectrum per market was set aside during the 2016 Incentive Auction. Larger

[5] Budget of the U.S. Government, A New Foundation for American Greatness, Office of Management and Budget, May 23, 2017, p. 19, www.budget.gov/budget.
[6] Tom Wheeler, FCC Chairman, "Enhancing Competition and Opportunity in the Mobile Marketplace," Federal Communications Commission, June 25, 2015, https://www.fcc.gov/news-events/blog/2015/06/25/enhancing-competition-and-opportunity-mobile-marketplace.

carriers were restricted from bidding on this spectrum in an effort to artificially increase competition in the market.[7] CAGW urges the FCC to eliminate this practice for future auctions.

The FCC should also closely monitor the qualified designated entity program to ensure that the process is not abused. During the AWS-3 auctions, DISH Network Corporation utilized three of its affiliated companies, SNR Wireless License Co LLC, Northstar Wireless, and American AWS-3 Wireless I LLC to purchase more than $13.3 billion of spectrum, potentially qualifying for $3.3 billion in taxpayer-funded discounts through the FCC's designated entities program.[8] Two of the three companies affiliated with DISH Network did not exist until a few months prior to the auction and reported to the FCC that they did not have any gross revenues. Yet, they were able to place more bids than T-Mobile, U.S. Cellular, and Verizon combined.[9]

Qualified designated entities receive a 25 percent discount on the purchase of spectrum through the FCC's auctions. FCC rules do not currently restrict joint bidding arrangements between designated entities and other entities, including coordinated bidding, agreeing not to bid in particular markets, or other potentially collusive conduct between large and small businesses. However, these arrangements convert what is supposed to be a program to help boost small businesses into a taxpayer-funded subsidy for larger companies, who can bid through the designated entities and reap the benefits of bidding discounts. CAGW urges the FCC to closely scrutinize the applications of potential designated entities to ensure they meet the qualifications for such a program prior to auction bidding.

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[7] Jon Brodkin, "T-Mobile to lose bid for extra limits on AT&T and Verizon spectrum," arsTechnica, June 25, 2015, https://arstechnica.com/business/2015/06/t-mobile-to-lose-bid-for-extra-limits-on-att-and-verizon-spectrum/.
[8] Thomas Gryta and Ryan Knutson, "Behind Dish Network's Race for Wireless Spectrum," *The Wall Street Journal*, February 12, 2015, https://www.wsj.com/articles/behind-dish-networks-race-for-wireless-spectrum-1423786487.
[9] Kelly Ayotte and Ajit Pai, "Ending Welfare for Telecom Giants," *The Wall Street Journal*, February 4, 2015, https://www.wsj.com/articles/kelly-ayotte-and-ajit-pai-ending-welfare-for-telecom-giants-1423095287.

The NPRM addresses several obstacles to increased wireless broadband deployment, including the attachment of equipment to right-of-way (ROW) poles and other structures. Many localities have created a lengthy application approval process, long waiting times for poles to be prepared for new equipment to be installed, and imposed high taxes and monthly fees.

The NPRM would streamline and accelerate the commission-established timeline for processing pole attachment requests through a one-touch-make-ready process. A new attacher could move its competitors' equipment to make room for its own equipment on a pole. This plan raises concerns about a competitor having access to view and move equipment that does not belong to them.

CAGW encourages the commission to consider the following questions regarding one-touch-make-ready: (1) If damage to an existing provider's equipment occurs, who is liable for making restitution to the provider and their customers? (2) Since each provider is using different, proprietary, and often patented designs in their equipment, how will the intellectual property of each provider be protected? (3) Who is responsible for protecting the property rights of pole lessees during the process of moving equipment? and, (4) What is adequate prior notice period to existing lessees when their equipment is to be moved?

The commission should also consider what it can do, either on its own or in consultation with Congress, to ensure that wireless providers have fair and timely access to municipally-owned poles. Congress excluded such poles from Section 224 when it adopted the Pole Attachment Act in 1978 for reasons very specific to that time and place. Congress was concerned about the deployment of cable systems, which it considered to be a local issue, and presumed that the managers of such entitles would be responsive to the needs of the

community.[10] However, As Chairman Pai has noted, the entities controlling access to these poles "have little interest in negotiating just and reasonable rates for private actors to access their rights of way."[11] In fact, some providers have reported rates for municipally-owned poles at double or even triple the rates they pay for access to other poles.

Another impediment to expansion of wireless services within communities are the additional fees and taxes imposed by federal, state, and local governments for licensing or franchise fees, or both. For many years, CAGW has pointed out the fallacy that such fees are not considered a tax, such as USF fees that communications providers pass along to consumers. Often these fees and taxes account for nearly one-third of a communications bill, and prove to be an impediment to the adoption of new services such as broadband internet by consumers. Additional fees that are only applied to internet service providers for the sole purpose of raising revenue increase consumer costs and may result in duplicative and/or discriminatory hidden taxes.

In 2007, Eugene, Oregon began assessing a 7 percent of gross internet sales licensing fee on companies that provide broadband internet services. On May 26, 2016, the Oregon Supreme Court upheld the city's authority to attach this surcharge.[12] This fee is in addition to the city's existing franchise fee on internet and cable service providers. In 2010, the League of Oregon Cities published a Telecommunications Toolkit, providing sample ordinances for cities to impose

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[10] Senate Report No. 95-580 to accompany S. 1547, as amended, Communications Act Amendments of 1978 (P.L. 95-234), 95th Cong., 1st Sess. 17-18, November 2, 1977.
[11] Remarks of Ajit Pai, FCC Commissioner at The Brandery, Cincinnati, Ohio, "A Digital Empowerment Agenda," Federal Communications Commission, September 13, 2016, p. 7, https://apps.fcc.gov/edocs_public/attachmatch/DOC-341210A1.pdf.
[12] City of Eugene, an Oregon municipal corporation, *Respondent on Review*, v. Comcast of Oregon II, Inc., an Oregon corporation, *Petitioner on Review*, (CC 160803280; CA A147114; SC S062816), p. 528, No. 31, http://www.publications.ojd.state.or.us/docs/S062816.pdf.

fees and taxes, based on the Eugene ordinance, for rights-of-way or pole attachments to generate revenue.[13]

These additional fees amount to nothing more than a tax on internet services, which is passed along to consumers.[14] The Eugene fee averages $3.15 per month per household and is directed to the city's general fund, which can be spent for any purpose deemed appropriate by the city government. Cities and towns around the state that are considering passing similar measures to increase their revenue base include La Grande, Monmouth, Talent, and Tualatin. Cities and towns that have adopted such ordinances include Creswell, Florence, Garibaldi, Gold Beach, Tigard, and Tillamook.

While municipalities are well within their rights to assess value on the rights-of-way under their jurisdiction, there are several concerns regarding these practices. First, if the user of the right-of-way is already paying a fee to the city for its use, the new tax/fee is duplicative. Second, as with the USF fee, these additional taxes and fees are passed on to consumers through higher service costs. Third, if the new tax/fee is applied only to those who provide internet service, and not to other users of the right-of-way, the ordinance is discriminatory. Even those cities that attempt to pass an ordinance that would not be discriminatory find that the ordinance can be problematic. La Grande tabled its consideration of a right-of-way licensing fee ordinance after concerns were raised about the effect it might have on other utilities, and whether the fee could be higher than the cap imposed by the FCC.[15]

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[13] "Telecommunications Toolkit," Sample Ordinances, League of Oregon Cities, 2010, http://www.orcities.org/Portals/17/Premium/20101018100014414.pdf.
[14] Christian Hill, "Comcast charging customers for city fee," *The Register-Guard*, September 10, 2016, http://projects.registerguard.com/rg/news/local/34777474-75/story.csp.
[15] Minutes, City Council Regular Session, City of La Grande, February 8, 2017, p. 2, http://www.cityoflagrande.org/muraProjects/muraLAG/lagcity/?LinkServID=A66C23C8-0547-FCF7-154AEAC132678DD8&showMeta=0.

On May 23, 2017, FCC Commissioner Michael O'Rielly commented before the 2017 Wireless Infrastructure Show in Orlando, Florida that "it is also hard to argue that the excessive fees charged are fair and reasonable compensation for the use of public rights of way."[16]

The myriad of laws and ordinances assessing these fees on internet service providers are potentially in conflict with the Permanent Internet Tax Freedom Act (P.L. 114-125). When an internet provider is charged additional fees to provide internet services just to line local government coffers, the fees are typically passed along to consumers and are therefore a *de facto* tax on internet access, which is prohibited by law. While local communities may wish to raise revenues for their general fund through local franchise or licensing fees in order to cover related operating expenses, it would be more appropriate for those localities to examine their operations to see where they can make cuts to reduce wasteful spending if they are using this income for any general government purposes.

With respect to the preemption of state and local laws relating to broadband deployment, in 2014, following an announcement by former FCC Chairman Tom Wheeler that the agency could use Section 706 of the Telecommunications Act of 1996 to preempt state laws restricting the deployment of certain broadband networks, two cities filed petitions requesting that the agency overturn their respective state laws (WCB Docket No. 14-115 and 14-116) that placed restrictions on their ability to expand government-owned networks beyond the boundaries set by the state. Section 706 specifically grants the FCC authority to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans

[16] Remarks of Michael O'Rielly, FCC Commissioner Before the 2017 Wireless Infrastructure Show, Orlando, Florida, Federal Communications Commission, May 23, 2017, p. 5, https://apps.fcc.gov/edocs_public/attachmatch/DOC-345021A1.pdf.

(including, in particular, elementary and secondary schools and classrooms)." That "capability" is further defined as broadband.

On March 24, 2004, the Supreme Court held in Nixon v. Missouri Municipal League (541 U.S. 125), that the Telecommunications Act of 1996 does not permit the FCC to overrule state laws regulating how municipal governments engage in telecommunications services.[17] The Court ruled that, "The class of entities contemplated by §253 does not include the State's own subdivisions, so as to effect the power of States and localities to restrict their own (or their political inferiors') delivery of telecommunications services. Pp. 4-14."[18]

As noted by Commissioner O'Rielly in his dissent on May 15, 2014, when the NPRM for Protecting and Promoting the Open Internet docket was approved, "…Congress never intended section 706 to be an affirmative grant of authority to the Commission to regulate the Internet. At most, it could be used to trigger *deregulation.*"[19] During that same meeting, Commissioner Pai directly countered Chairman Wheeler's proposition that the FCC should expand broadband regulation and that promoting municipal broadband is necessary in order to improve competition: "… pursuing net-neutrality regulations under section 706 or Title II places in jeopardy every other goal of this Commission in the communications marketplace … threatening the $60 billion a year that private companies invest in their broadband networks. … This brave new world will deter new entrants and reduce competition in the broadband market."[20]

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[17] Nixon, Attorney General of Missouri v. Missouri Municipal League et al., Supreme Court of the United States, Syllabus, October Term 2003, Certiorari to the United States Court of Appeals for the Eighth Circuit, No. 02-1238, Argued January 12, 2004, Decided March 24, 2004, p. 2, http://transition.fcc.gov/ogc/documents/opinions/2004/02-1238-032404.pdf.

[18] Ibid.

[19] Dissenting Statement of Commissioner Michael O'Rielly, FCC 14-61, Federal Communications Commission, May 15, 2014, http://www.fcc.gov/article/fcc-14-61a6.

[20] Dissenting Statement of Commissioner Ajit Pai, FCC 14-61, Federal Communications Commission, May 15, 2014, http://www.fcc.gov/article/fcc-14-61a5.

When state laws or local ordinances hinder or restrict the potential deployment of advanced telecommunications services, preemption may very well be in order under Section 8 of the Constitution. However, CAGW urges the FCC to use restraint in exercising this authority, and to avoid using it to overturn state laws that protect municipalities from engaging in potentially costly taxpayer-funded municipal or government-owned broadband networks.

Again, thank for you for the opportunity to share these views and concerns.